

**Title 8, California Code of Regulations  
Chapter 4.5, Division of Workers' Compensation  
Subchapter 1  
Administrative Director – Administrative Rules**

**Article 5.1**

**Spinal Surgery Second Opinion Procedure**

**Section 9788.0. Definitions.**

As used in this Article:

- (a) "Second opinion physician" is the physician who is randomly selected pursuant to subdivision (b) of Labor Code section 4062 to render the second opinion on a treating physician's recommendation of spinal surgery.
- (b) "Spinal surgery" is any non-diagnostic invasive procedure to the spine or associated anatomical features to perform an operative or curative procedure which is not primarily an anesthetic procedure. "Spinal surgery" does not include penetration of the body by needles in the performance of acupuncture by a practitioner whose license permits the performance of acupuncture. "Spinal surgery" does not include surgery which is required because of a bona fide medical emergency.
- (c) "Completion of the second opinion process" occurs on the forty-fifth day after the receipt of the treating physician's report by the employer.
- (d) "Receipt of the treating physician's report" is the day it was received by the employer.
- (e) "Material familial affiliation" means a relationship in which one of the persons or entities listed in subdivision (c) of Labor Code section 4062 is to the second opinion physician the parent, child, grandparent, grandchild, sibling, uncle, aunt, nephew, niece, spouse, or cohabitant. For entities of the employer, insurer, physician, medical group, independent practice association, administrator, utilization review entity, facility, or institution mentioned in subdivision (c) Labor Code section 4062, which are not persons, the familial affiliation shall be determined by considering the relationship to the second opinion physician of all of the officers, directors, owners and management employees, and individual claims administrators and supervisors.
- (f) "Material financial affiliation" includes all of the following financial relationships between the second opinion physician and another person or entity listed in subdivision (c) of Labor Code section 4062, or parent or subsidiary or otherwise related business entity of a person or entity:
  - (1) One has a direct or indirect investment worth \$2,000 or more in the other;
  - (2) One is a director, officer, partner, trustee, employee, or holds any position of management in the other;
  - (3) One has a direct or indirect interest worth two thousand dollars or more in fair market value in an interest in real estate owned or controlled by the other;
  - (4) one has received income of any kind, including gifts, from the other, aggregating three hundred dollars or more within the twelve months prior to the time of

selection as a second opinion physician, except that the following income shall not be counted for this purpose:

- A. income for services as a second opinion physician;
- B. income for services as a treating physician;
- C. income for services as an agreed medical examiner;
- D. income for services as a panel Qualified Medical Evaluator selected for unrepresented employees;

(5) One has an employment or promise of employment relationship with the other;

(g) "Material professional affiliation" includes, but is not limited to, any relationship in which the second opinion physician shares office space with, or works in the same office of, any of the other persons or entities listed in subdivision (c) of Labor Code section 4062.

(h) "Parent, subsidiary, and otherwise related business entity" have the same meanings as in the Section 18703.1, Title 2, Division 6 of the California Code of Regulations.

(i) "Income" of a person includes the income of that person's business partner, physician member of the office of a group practice as defined in Labor Code section 139.3, spouse, cohabitant, and immediate family. Income of a second opinion physician does not include income from employment which had terminated prior to the time the physician was selected as a second opinion physician where there is no reasonable prospect of future employment.

### **Section 9788.1 Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.**

An employer who objects to the treating physician's recommendation for spinal surgery shall serve the objection on the Administrative Director, the employee, the employee's attorney, if any, and on the treating physician within 10 days of receipt of the treating physician's report containing the recommendation. The employer shall include with the objection a copy of the treating physician's recommendation to which the employer objects.

### **Section 9788.2. Qualifications of Spinal Surgery Second Opinion Physicians**

(a) The Administrative Director shall maintain a list of qualified surgeons who have applied, and whom the Administrative Director has found to be eligible to give second opinions under Labor Code § 4062 (b).

(b) To apply to be on the Administrative Director's list, a physician shall demonstrate to the satisfaction of the Administrative Director that the physician:

- (1) Is currently board certified as a neurosurgeon or orthopedic surgeon; and if an orthopedic surgeon, has successfully completed a postgraduate fellowship in the subspecialty of Orthopedic Surgery of the Spine, accredited by the Accreditation Council for Graduate Medical Education;
- (2) Has current unrestricted hospital privileges at an accredited hospital in the United States to perform spinal surgery without proctoring;
- (3) Has an unrestricted license as a physician and surgeon in one of the states of the United States; and

- (4) Has no record of previous discipline by any governmental physician licensing agency.

### **Section 9788.3. Application Procedures**

Physicians seeking to serve as a second opinion physician shall:

- (a) Make application to the Administrative Director on forms prescribed by the Administrative Director;
- (b) Furnish certified copies of their board certification, fellowship, and hospital privileges, and shall submit other documentation of their qualifications as the Administrative Director may require; and
- (c) Pay a fee to be determined by the Administrative Director, sufficient to cover the costs of certifying the physicians.

### **Section 9788.4. Removal of Physicians from the Spinal Surgery Second Opinion Physician List.**

The Administrative Director shall remove from the list any physician whenever the Administrative Director learns:

- (a) That the physician no longer meets the qualifications to be on the list; or
- (b) That the California Medical Board or any other state medical board from whom the physician is licensed, has filed any accusation against the physician; or
- (c) That the physician, having been notified by the Administrative Director of the physician's selection to render a second opinion in any case, has not served the second opinion report in that case within the time limits prescribed in these regulations; or
- (d) That the physician's application to be on the list contained statements which were not true; or
- (e) That the physician has at any time failed to disclose to the Administrative Director that the physician had a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062 in any case in which the physician had been selected as a second opinion physician.

### **Section 9788.5. Random Selection of Second Opinion Physician.**

Within five (5) working days of the Administrative Director's receipt of an objection to a recommendation for spinal surgery, the Administrative Director shall randomly select a physician from those listed physicians located within a thirty (30) mile radius of the employee's address, provided that six physicians are located within that radius; and if six are not located within that radius, using ever increasing radii, until at least six (6) physicians are located from which a random selection may be made. The selected second opinion physician shall immediately notify the Administrative Director if he has a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062. Upon such notification, the Administrative Director shall immediately select a replacement second opinion physician.

**[Note to the public: Given the very short time frame for completing the second opinion process, the Division is grappling with how to incorporate the statutory time**

**frame for represented parties to agree on an AME for the second opinion process. The Division invites suggestions on this issue.]**

Within ten days of the selection of a second opinion physician, either the employer or the employee may object to the selection on the basis that the second opinion physician has a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062, by filing a written objection with the Administrative Director and serving the other parties. The Administrative Director may either sustain the objection, in which case a new selection shall be made, or deny the objection.

#### **Section 9788.6. Examination by Second Opinion Physician.**

The second opinion physician must physically examine the patient-employee before rendering a second opinion. The employer shall, and the employee may, furnish all relevant medical records to the second opinion physician, including x-ray, MRI, CT, and other diagnostic films. The employer shall furnish appropriate transportation to the employee whenever required. If a special form of transportation is required, it is the obligation of the employer to arrange for it. The employer shall furnish transportation expense in advance of the examination. Except for the examination itself, the second opinion physician shall have no ex parte contact with any party. All communications between the second opinion physician and any party shall be in writing, with copies served on the other parties.

**[Note to Public: The Division is considering whether it is necessary for the second opinion physician to physically examine the patient and invites comment on whether the second opinion evaluation should be conducted on the records only, as a streamlined independent medical review procedure. Public comment is sought on this issue.]**

#### **Section 9788.7. Time limits for providing reports:**

Second opinion physicians shall serve their opinion on the employer, the employee, and the employee's attorney, if any, within forty-five days of receipt of the treating physicians report (as defined herein).

#### **Section 9788.8. Charges for Services of Second Opinion Physician.**

Payment for the services of the second opinion physician shall be made by the employer. The fee shall be the same as the fee allowed under Section 9795 for a Basic Comprehensive Medical-Legal Evaluation, without modifiers which might otherwise be allowed under Section 9795(d).

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.